

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PERIODIC REPORTING (PROPOSALS)
SIXTEEN THROUGH TWENTY))

Docket No. RM2012-2

**MOTION OF GAMEFLY, INC.,
TO STRIKE PORTIONS OF
USPS PETITION FOR RULEMAKING
(December 7, 2011)**

GameFly, Inc. ("GameFly") respectfully moves to strike the following portions of the petition for rulemaking filed by the Postal Service in this docket on November 30, 2011:¹

- (1) The carryover sentence on pages 33-34; and
- (2) Footnote 6 on page 34.

These portions provide no probative support for—indeed, are completely immaterial to—the analytical principles that the Postal Service proposes in its petition. Rather, the material is a transparent attempt to relitigate issues that were resolved in Docket No. C2009-1, *Complaint of GameFly, Inc.* Moreover, the portions at issue contain mailer-specific information whose disclosure is a clear violation of 39 U.S.C. § 412 under the Postal Service's own interpretation of that provision, and the Commission's policies under 39 U.S.C. § 410 governing the protection of commercially sensitive information.

¹ Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposals Sixteen Through Twenty) (November 30, 2011).

(1)

The November 30 petition asks the Commission to begin a rulemaking under 39 C.F.R. § 3050.11 to consider several proposals to change the analytical principles governing the Postal Service's periodic reports to the Commission. Proposal Twenty, entitled "Modification of the Business Reply Mail Cost Model," would modify "the Business Reply Mail (BRM) cost model that contains the qualified BRM (QBRM) cost avoidance estimate and the BRM fee cost studies." Petition at 15; see *generally id.* at 15-41.

The references to GameFly appear in a portion of Proposal 20 entitled "Weight Averaging Counting (Flats & Parcels)" (Petition at 33-35). On pages 33-35, the Postal Service explains how it estimated the productivity of the weight averaging processes used to determine piece counts for nonletter BRM at the "11 different sites" where nonletter BRM is processed. *Id.* The results of this analysis appear in the 'Wt Avg Flats & Parcels' of the Excel file 'BRM_PRODUCTIVITY_DATA.xls' submitted by the Postal Service on the same date (reproduced at Attachment A, *infra*).

Although GameFly has not reviewed the accuracy of the Postal Service proposal, GameFly has no general objection to the narrative explanation or the data in the accompanying Excel worksheet. GameFly strongly objects, however, to footnote 6 on page 34 of the November 30 Petition. Footnote 6 is a 15-line aside devoted entirely to GameFly:

All four plants that serve GameFly's distribution centers were included in this study. It should be noted that the postage due clerks at all four plants walked the workroom floor to locate GameFly mail before performing the weight averaging operation because that mail could be found in virtually any operation. In addition, the clerks culled through every mail piece

before weight averaging the mail to ensure that none of the mail pieces were outgoing mail pieces being sent from GameFly to its customers. This culling operation was necessary because the GameFly outgoing and return mail pieces look virtually identical, which was an issue that surfaced in Docket No. C2009-1. One of the plants also faced the GameFly mailpieces in tubs in the exact same direction at the request of GameFly. Once the culling and/or weight averaging operation had been completed, the tubs were capped and placed in rolling stock for dispatch. While observing these tasks, it was difficult to discern any material difference between the treatment of GameFly mail pieces and the special treatment that GameFly claimed Netflix received in docket No. C2009-1. The only observed difference was that these tasks occurred in destinating, rather than originating, operations.

This footnote is utterly gratuitous and irrelevant to the analytical principle that it ostensibly supports. Whether, and how, GameFly pieces are culled “*before performing the weight averaging operation*” (emphasis added) has nothing to do with the validity of the method used by the Postal Service to estimate the productivity of the weight averaging operation itself. Whether employees at one plant faced the GameFly pieces, and whether the facing occurred at the request of a GameFly employee, are equally irrelevant to the weight averaging operation that is the subject of the Postal Service petition. Equally irrelevant are the opinions of the (anonymous) authors concerning the general similarities or differences between the methods that the Postal Service chooses to use to process GameFly vs. Netflix mail generally. In sum, the Postal Service’s statements about GameFly, even if true, would add nothing to the validity of the analytical principle that the Postal Service asks the Commission to approve in Proposal 20.

(2)

It is obvious that the Postal Service has included footnote 6 not to support the relief sought in this docket, RM2012-2, but to stuff the record with assertions that the

Postal Service hopes to cite to the D.C. Circuit in *GameFly, Inc. v. PRC*, No. 11-1179 (the pending proceeding for judicial review of the complaint case), or to the Commission in a future phase of the complaint docket if the court remands the case. To use the current rulemaking docket for this purpose, however, is grossly improper. The D.C. Circuit has jurisdiction of the case now, and will retain jurisdiction until the court relinquishes it. See 28 U.S.C. § 2349(a) (first sentence).

(3)

Moreover, the Postal Service's stratagem will still be improper even if the Commission regains jurisdiction of the case by remand from the court. During the two year pendency of the complaint docket before the Commission, the Postal Service had ample opportunity to submit evidence on the characteristics of GameFly and Netflix mail; the methods used by the Postal Service to process each customer's mail; the costs of handling each customer's mail; and the validity of any possible justifications for the Postal Service's discrimination between the two customers. After an exhaustive inquiry into the facts, however, the Commission specifically found that GameFly and Netflix were "similarly situated"; that the Postal Service was discriminating between the two customers; and that the Postal Service had failed to establish any rational or legitimate basis—including any material difference between GameFly and Netflix mail in processing costs, operations or mail characteristics—for the Postal Service's discrimination against GameFly. Order No. 718 (April 20, 2011) at ¶¶ 4014-4021, 4069-4126, 4132, 4140-4246. In particular, the Commission specifically found that that the Postal Service could give GameFly Netflix-like processing at a cost similar to the current cost of providing the same type of handling to Netflix. *Id.* at ¶¶ 4174-76.

The Postal Service chose not to seek judicial review of these findings within the statutory period authorized by 39 U.S.C. § 3663. Under the circumstances, the Postal Service should not be allowed to relitigate these factual issues. *See, e.g., United States v. AT&T*, 714 F.2d 178, 181 (D.C. Cir. 1983) (“failure to pursue an appeal . . . precludes subsequent litigation of a claim”).

(4)

Even if the merits of footnote 6 were properly before the Commission, the claims in the footnote are utterly beside the point. As noted above, the Commission specifically found that the Postal Service could provide Netflix-like processing to GameFly at a cost similar to the current cost of providing the same type of handling to Netflix. Order No. 718 at ¶¶ 4174-76. If the Postal Service is using a costlier method, that outcome is the Postal Service’s responsibility.

GameFly has tried for years to work with the Postal Service to develop consistent, efficient and nondiscriminatory prices and terms of service for all round-trip DVD mailers. GameFly has also stated its willingness to change its mailpiece design and accept alternative mail processing practices in exchange for nondiscriminatory pricing and terms of service.² The Postal Service has rebuffed GameFly every step of the way. To blame GameFly now for the Postal Service’s refusal to end its discrimination adds insult to injury. Likewise, even if the Postal Service were correct in

² In this regard, the Postal Service’s claim that similarity in appearance between “GameFly’s outgoing and return mail pieces” “surfaced” as “an issue” in Docket No. C2009-1 (Petition at 34 n. 6) is sheer revisionism. If the Postal Service had raised the issue, GameFly would have made clear—as it did in analogous contexts—that GameFly was willing to make reasonable changes in the appearance of its mailpieces in exchange for nondiscriminatory service.

observing that GameFly sometimes gets similar culling to Netflix, GameFly pays double the price for this "privilege."

(5)

The carry-over sentence on pages 33-34 of the November 30 Petition should also be stricken. The sentence ranks GameFly by name among the users of nonletter size BRM; and GameFly is the only such postal customer that the Postal Service identifies in this way. *Id.* This disclosure of mailer-specific information is grossly improper.

First, it violates 39 U.S.C. § 412 as the Postal Service has interpreted that provision. Section 412(a) provides in relevant part that, except for certain exceptions not relevant here, "no officer or employee of the Postal Service shall make available to the public by any means or for any purpose any mailing or other list of names or addresses (past or present) of postal patrons or other persons." The Postal Service has construed this provision as shielding not only the names of individual mailers, but also the volume and financial information for individual customers. See, e.g., Docket No. A2011-1, *In the Matter of: East Akron Station, Akron, OH 44305*, USPS Notice of Filing and Application for Non-Public Status (June 17, 2011); Docket No. C99-1, *Complaint on Post E.C.S.*, USPS Answer in Opposition to UPS Motion to Compel Answers to Interrogatories UPS/USPS-25-33 (July 6, 1999).

Second, the disclosure violates the Commission's policies under 39 U.S.C. § 410(c)(2) for the protection of "information of a commercial nature . . . which under good business practice would not be publicly disclosed . . ." *Id.*; see, e.g., Docket No.

R2008-1, *Notice of Price Adjustment*, Notice of the USPS of Filing of USPS-R2008-1/NP2 (March 13, 2008) at 1 (noting “consensus” about the “danger of public disclosure” of information that “knowledgeable observers” could use to “draw reasonable inferences and thereby identify at least some of the publications and their confidential [volume and postage] data”).

The Postal Service is well aware of these policies; it invoked them repeatedly in the GameFly complaint case in an effort to keep a variety of information about itself and other customers under seal. See Presiding Officer’s Ruling No. C2009-1/12 (Nov. 18, 2009), *aff’d*, Order No. 38 (Jan. 7, 2010); Presiding Officer’s Ruling No. C2009-1/27 (July 16, 2010). Moreover, the Postal Service is specifically aware that users of nonletter-size BRM regard information about their volume of incoming BRM to be commercially sensitive. Docket No. MC99-2, *Classification and Fees for Weight-Averaged Nonletter-Size Business Reply Mail, 1999*, Motion of the USPS Requesting Protective Conditions for Workpaper I of Witness Leslie Schenk (March 10, 1999) (moving to keep customer-specific incoming BRM volume information under seal).

The Postal Service jettisoned any such concern in the September 30 petition. The Postal Service did not file the information on pp. 33-34 under seal; did not ask leave from the Commission to do so; gave GameFly no advance notice that such disclosure was being contemplated; and gave GameFly no opportunity to state whether it regarded the information as commercially sensitive. These facts, coupled with the absence of any comparable disclosure in the November 30 petition about any other user of nonletter-shaped BRM, warrant the conclusion that the disclosure was a

deliberate and calculated violation of the nondisclosure requirements of Title 39 for the purpose of punishing GameFly.

The only appropriate remedy at this point is to strike the offending passage. The quoted sentence has no redeeming probative value in this docket that might justify the burden and expense of creating a separate proprietary version to file under seal. Moreover, striking the offending passage is essential to preserve the credibility of the Commission's standards and procedures for the protection of mailer-specific information that may be commercially sensitive, and to deter the Postal Service from engaging in such conduct in the future.

GameFly reserves the right to seek further relief under 39 U.S.C. § 3662(d).

Respectfully submitted,

/s/

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December 7, 2011

ATTACHMENT A

Weight Averaging (Flats & Parcels) Counting Productivity Data

			Flats	
Facility	Minutes	Hours	Pieces	Pcs Per Hour
PDC 1	24.37	0.41	4,906	12,080
DU 13	0.45	0.01	46	6,133
DU 13	0.38	0.01	47	7,520
DU 13	0.39	0.01	46	7,138
DU 13	0.34	0.01	48	8,576
DU 13	0.53	0.01	46	5,175
DU 13	0.39	0.01	49	7,538
DU 13	0.51	0.01	48	5,684
DU 13	0.48	0.01	48	5,979
DU 13	0.48	0.01	49	6,168
DU 13	0.56	0.01	41	4,393
DU 13	0.67	0.01	45	4,030
DU 13	1.02	0.02	50	2,941
DU 13	1.00	0.02	46	2,751
DU 13	0.50	0.01	49	5,939
DU 13	0.40	0.01	49	7,381
PDC 11	2.65	0.04	1,111	25,202
PDC 11	0.75	0.01	170	13,600
PDC 11	5.21	0.09	502	5,785
PDC 11	2.95	0.05	892	18,153
PDC 11	1.70	0.03	764	26,912
PDC 11	3.55	0.06	1,130	19,081
PDC 11	3.34	0.06	882	15,868
PDC 11	0.68	0.01	168	14,933
PDC 11	2.92	0.05	1,129	23,238
PDC 11	4.58	0.08	1,914	25,102
			Tub Average	11,050
			Tub Percent	87.53%
PDC 23	1.44	0.02	1,308	54,437
PDC 23	1.58	0.03	2,229	84,467
PDC 23	1.75	0.03	2,208	75,703
PDC 23	1.58	0.03	2,040	77,305
PDC 23	1.05	0.02	385	22,000
PDC 17	0.86	0.01	2,348	164,750
PDC 17	0.81	0.01	2,719	202,695
PDC 17	0.93	0.02	2,560	164,875
PDC 17	0.92	0.02	1,742	114,033
PDC 17	0.82	0.01	1,987	146,245
PDC 17	1.68	0.03	2,581	92,101
PDC 17	0.87	0.01	1,158	80,009
PDC 17	0.87	0.01	2,475	171,028
PDC 17	0.87	0.01	2,624	181,305
PDC 17	0.87	0.01	2,401	165,890
PDC 17	0.87	0.01	2,040	140,933
PDC 17	0.87	0.01	1,392	96,158
			Rolling Stock Average	119,643
			Rolling Stock Percent	12.47%
			Aggregate Average	24,592
			Parcels	
Facility	Minutes	Hours	Pieces	Pcs Per Hour
DU 20	0.40	0.01	46	6,987
DU 20	0.48	0.01	52	6,500
PDC 10	0.35	0.01	27	4,585
PDC 10	0.37	0.01	26	4,179
PDC 10	0.37	0.01	27	4,438
PDC 10	0.37	0.01	26	4,274
PDC 10	0.33	0.01	25	4,523
PDC 10	0.39	0.01	25	3,896
PDC 10	0.40	0.01	50	7,531
PDC 10	0.40	0.01	48	7,170
PDC 10	0.39	0.01	48	7,481
PDC 10	0.37	0.01	48	7,749
PDC 10	0.46	0.01	48	6,216
PDC 10	0.37	0.01	48	7,749
PDC 10	0.37	0.01	56	9,164
		Sample Mean		6162.741
		Standard Deviation		1695.650
		n (Sample Size)		15
		t _n (0.05 probability)		2.131
		k (+/- percent from population mean)		0.150
		N (required sample size)		15